



## **I. FACTS**

Centre One brought this action against various Verizon entities, Vonage entities and deltathree in December of 2008. The parties have gone through infringement and invalidity contentions and have exchanged claim terms for construction pursuant to the schedule. Discovery is still in the very early stages.

On February 19, 2010, the Court entered an Order (Docket No. 251) staying this action for sixty days and permitting Centre One's counsel, attorneys at the Fish & Richardson P.C. and Parker, Bunt & Ainsworth, P.C. firms, to withdraw. The stay was entered to allow Centre One to retain and bring new counsel up to speed. *See* Order. The stay expired on April 20, 2010 and no counsel for Centre One has made an appearance.

Defendant deltathree is a small, publicly traded company with 34 full-time employees. *See* Declaration of Mr. Baruch. It is a matter of public record that the company has reported substantial losses over the past two years. *Id.* The pendency of this lawsuit has severely, adversely affected the company's finances and ability to raise capital that the company needs to ensure its survival. *Id.*

## **II. ARGUMENT**

Rule 41(b) of the Federal Rules of Civil Procedure provides that:

If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.

Fed.R.Civ.P. Rule 41(b). In this case, Plaintiff Centre One has not prosecuted this case past the early stages of discovery, *see* February 24, 2010 Order at 6 (Docket No. 256), and has not retained new counsel to pick up prosecution of this case after the withdrawal of its previous counsel within the sixty day stay period set by the Court. Centre One, therefore, has not

complied with the Court's February 19 Order (Docket No. 251) and has failed to prosecute its case.

At the same time, the pendency of this case has had, and continues to have, a substantial adverse affect on the ability of Defendant deltathree to obtain capital it needs to survive. For this reason, Defendant deltathree respectfully requests that this Court grant deltathree's motion to dismiss this action against it.

WHEREFORE, deltathree respectfully requests that this Court enter an order, substantially in the form with the proposed order attached hereto, dismissing CentreOne's claims against Deltathree pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Deltathree stipulates that if the Motion is granted, Deltathree withdraws its Counterclaims against Centre One without prejudice.

Dated: April 21, 2010

Respectfully submitted,

/s/ E. Glenn Thames, Jr.

Robert C. Bertin (admitted *pro hac vice*)  
Warren Anthony Fitch (admitted *pro hac vice*)  
Tuhin Ganguly (Admitted *pro hac vice*)  
**BINGHAM MCCUTCHEN**  
2020 K Street NW  
Washington, DC 20006-1806  
(202) 373-6672 (telephone)  
(202) 373-6001 (facsimile)

E. Glenn Thames, Jr.  
Texas Bar No. 00785097  
glennthames@potterminton.com  
**POTTER MINTON, PC**  
110 N. College  
500 Plaza Tower  
Tyler, TX 75702  
(903) 597-8311 (telephone)  
(903) 593-0846 (facsimile)

*Attorneys for Defendant deltathree, Inc.*

**CERTIFICATE OF SERVICE**

This is to certify that counsel of record who are deemed to have consented to electronic service are being served on this 21st day of April, 2010 with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

Additionally, a copy of this Motion to Dismiss Pursuant to Rule 41(b) has been mailed on this day by certified mail, return receipt requested, to Centre One at its address listed in its complaint as follows:

Centre One  
10 Via Tunas  
San Clemente, CA 92673

/s/ E. Glenn Thames, Jr.  
E. Glenn Thames, Jr.